

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-7100

United States Court of Appeals

FOR THE SECOND CIRCUIT

DRYS SHIPPING CORPORATION,

Plaintiff-Appellee,

—against—

Freights, Sub-Freights, Charter Hire and/or
Sub-Charter Hire of the M.S. DRYS,

and

A/S FALKEFJELL and A/S DOVREFJELL,

Defendants-Appellants,

and

ATLANTIC AND GREAT LAKES STEAMSHIP CORPORATION,

Garnishee-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF PLAINTIFF-APPELLEE DRYS SHIPPING CORPORATION

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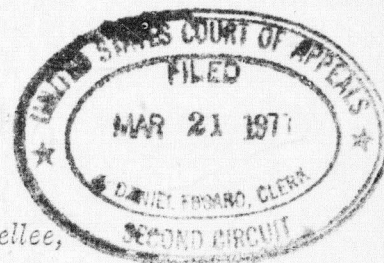


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UNITED STATES COURT OF APPEALS
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A/S FALKEFJELL and A/S DOVREFJELL,

Defendants-Appellants,

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ATLANTIC AND GREAT LAKES STEAMSHIP
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF PLAINTIFF-APPELLEE
DRYS SHIPPING CORPORATION

ISSUES PRESENTED FOR REVIEW

1. Does this Court have jurisdiction of an appeal from an order of the District Court denying a motion to vacate a maritime attachment and in rem arrest of sub-charter hire of M.S. DRYS?
2. Does an agreement providing for arbitration in London of any dispute between the parties to a contract of time charter party of M.S. DRYS preclude either party from obtaining security through use of provisional remedies available under the contract and general maritime law?

STATEMENT OF THE FACTS

Plaintiff-Appellee Drys Shipping Corporation ("Owner"), as owner of M.S. DRYS (the "Vessel"), entered into a contract of time charter party of the Vessel dated August 22, 1972 (the "Charter") with Defendants-Appellants A/S Falkefjell and A/S Dovrefjell ("Charterers"), as charterers. The Charter (App.42a - 48a) was a detailed contract consisting of both a printed portion (the familiar "New York Produce Exchange" form) and a typewritten "Rider" containing thirty one typed clauses and provided for Charterers' use of the Vessel for 5 years, 45 days more or less at Charterers' option. Clause 17 of the printed portion, providing for arbitration of any disputes between the parties, was amended to show London as the place of arbitration instead of New York. Clause 18 was not amended in any way; it provided that Owner "shall have a lien upon all cargoes, and all sub freights for any amounts due under this Charter, including General Average Contributions" and that "Charterers to have a lien on the Ship for all monies paid in advance and not earned". (App.43a)

None of the Rider clauses of the Charter (App.44a - 48a) modified either the arbitration clause or the lien clause in any way. However, Clause 54 of the Charter gave Charterers an additional right with respect to amounts disbursed by Charterers for Owner's account, providing that Charterers had the right to deduct such sums from

their payments of charter hire. The Charter did not contain any choice of law provision or any provision that the courts of any particular country should have jurisdiction over the parties.

The Vessel commenced performance of the Charter on or about April 8, 1973 and thereafter carried various cargoes for Charterers' account and pursuant to Charterers' orders. In the course of its performance of the Charter the Vessel was severely damaged by stevedores and others for whom Charterers were responsible in the course of loading and discharging Charterers' cargoes. (App.2a) As the damages were so severe as to affect the classification of the Vessel and it was clear that substantial and lengthy repairs would be necessary to return the Vessel to "class", a Memorandum of Agreement ("Memorandum") (App.70a - 73a) was made between Owner and Charterers on July 2, 1976 as to how the repairs should be effected. The Memorandum specifically provided that, if the time required for repair of the stevedores' damage extended beyond the time required for other repair and maintenance which was for Owners' account,

then the vessel shall be considered as on-hire as from that moment until such time as the repairs of the stevedores' damage are completed

(App.71a)

and

"(e) The Charterers will pay to Owners' bank the whole of the direct cost attributable to repairs of the stevedores' damage under Clause 3(b) and hire for any time chareable [sic] to Charterers under Paragraph (c) of this Clause *** The provisions of Clause 5 of the Charterparty [providing for payment of hire - see App.42a] shall apply to the payments required under this clause."

(App.71a - 72a; emphasis added)

The Memorandum also provided that the payment by Charterers under Paragraph 3 (e), quoted above, was "without prejudice to the Charterers' rights to dispute (either under Charterparty Clause 30 or otherwise howsoever) such account or any on hire period***". (App.72a) The Memorandum concluded with the statement that it was the irrevocable intention of both parties to proceed with "all arbitrations required hereunder as a matter of urgent priority" and that the terms of the Memorandum "shall for purposes of the Arbitration Clause in the Charterparty be deemed to be a part of the Charter". (App.72a - 73a)

Pursuant to the parties' agreement, the Vessel completed another voyage for Charterers' account and then proceeded to Piraeus, Greece for repairs. (App. 106a) There the Vessel underwent joint inspection and made some repairs for Owner's account during the period August 9 through September 14, 1976. (App. 135a - 136a) Thereafter, the Vessel underwent repairs of the stevedores'

damage until November 29, 1976. (App. 136a) Despite the Memorandum of July 2, 1976 and Owner's numerous demands, Charterers failed to pay hire for the periods of time the Vessel was making repairs of the stevedores' damage in the total amount of \$327,065.61 or to pay for the repair costs directly attributable to the repair of the stevedores' damage in the total amount of \$471,621.14. (App. 110a, 136a - 137a)

Previous disputes between the parties had led both to appoint arbitrators in London in March 1976. (App. 62a, 49a) In December 1976, shortly after the Vessel had completed its repairs at Piraeus, Owner's London solicitors, Richards, Butler & Co., advised the arbitrators that Charterers' solicitors, Sinclair, Roche & Temperly, had not responded to a request to work out a timetable for the arbitration and sought from the arbitrators an Order for Directions, including the fixing of a hearing date. (App. 94a - 95a) Charterers' solicitors replied that they were waiting instructions from Charterers. (App. 96a)

Nothing further occurred in the London arbitration until Owner commenced its action below with process of maritime attachment and in rem arrest of the Vessel's sub-charter hire in the hands of Atlantic and Great Lakes Steamship Corp. ("Garnishee"). This brought a prompt response by Charterers' solicitors to the effect that they were "now in a position to discuss with your solicitors

the terms of an order for directions progressing the arbitration" and further intended to apply to the arbitrators for an interim award declaring Owner's asserted lien on the sub-charter hire to be improper. (App. 97a) However, despite this response it does not appear that the London arbitration has made any progress since that time. (App. 149a)

Owner commenced its action against Charterers in the District Court below in order to obtain security for the unpaid hire and repair costs relating to the repair of the stevedores' damage to the Vessel in the total amount of \$798,686.75. (App. 110a - 111a) In taking this action Owner was motivated by Charterers' failure to comply with its undertakings to pay hire during the repair period and the cost of repairs of stevedores' damage to the Vessel pursuant to the Memorandum dated July 2, 1976 (App. 106a; see App. 70a - 73a) and by some evidence that Charterers may be experiencing financial difficulties. (App. 106a - 107a; see App. 147a) Owner did not seek to avoid arbitration in London but merely to ensure that arbitration did not become a meaningless exercise. (App. 107a)

As a result of the maritime attachment and in rem arrest (App. 114a, 115a, 116a) Garnishee has reported that it holds \$121,701.57 of sub charter hire subject to the order of the District Court. None of the three New York banks served with process of maritime attachment

(App. 117a, 118a, 119a) reported holding any funds or other assets of Charterers.

Shortly after the commencement of Owner's action, Charterers moved for an order vacating the maritime attachment, setting aside Owner's maritime lien on sub charter hire of the Vessel and dismissing Owner's complaint for lack of subject matter jurisdiction or alternatively on the ground of forum non conveniens. (App.35a - 41a) Charterers did not dispute that they were not to be found within the District. (see App.7a) Rather, they contended that the dispute between Owner and Charterers which was described in the complaint was subject to London arbitration pursuant to the Charter of the Vessel and the Memorandum dated July 2, 1976, and that, in view of the agreement for London arbitration, the court did not have jurisdiction to grant an attachment. Alternatively, Charterers argued that Owner was not entitled to a maritime lien on the sub charter hire despite Clause 18 of the Charter.

On February 15, 1977 Judge Goettel issued an Opinion and Order denying Charterers' motion to vacate the arrest and attachment "subject to renewal upon affidavits setting forth the unquestioned contractual intent of the parties in the 'Memorandum of Agreement' dated July 2, 1976, or, if that is not possible, the availability of witnesses to testify as to the contractual intent". (App.14a - 28a) Charterers have not attempted to make the evidentiary showing suggested by Judge Goettel.

POINT I

THE CONDITIONAL ORDER OF THE DISTRICT COURT DENYING
CHARTERERS' MOTION TO VACATE THE ATTACHMENT AND IN
REM ARREST OF SUB CHARTER HIRE IS NOT APPEALABLE

Under 28 U.S.C. §1291, the jurisdiction of United States courts of appeal is limited to review of final decisions of the district courts:

"§1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Almost a century ago, in the case of Cushing v. Laird, 107 U.S. 69 (1883), the United States Supreme Court announced that an order of a district court denying a motion to vacate an attachment was not an order subject to appellate review. In that case, the Court stated:

"In a court of admiralty, as in a court of common law, a process of foreign attachment is auxiliary and incidental to the principal cause. *** Neither the principal defendant nor the garnishees can appeal until after a final decree against them. The first decree against these garnishees, ascertaining their liability, was interlocutory only, and, if the libellants had ultimately failed to recover judgment against the principal defendant and execution against the

garnishees, would have been of no avail to the libellants, and of no effect against the garnishees. The appeal of the garnishees from this interlocutory order of the District Court was therefore rightly dismissed by the Circuit Court, and the order of dismissal must be affirmed."

170 U.S. at 76

The rule of Cushing v. Laird, supra, rendering unappealable the order of a district court denying a motion to vacate an attachment, is still the rule in this Circuit today. This is true despite the "collateral order" doctrine of Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949), holding certain collateral orders to be "final" orders. As this Court stated in West V. Zurhorst, 425 F.2d 919 (2d Cir. 1970), in dismissing an appeal from the district court's order denying a motion to vacate an attachment,

"***The increase in the burden on the courts of appeals in the last decade, with nearly three times as many appeals in 1969 as in 1960, *** hardly suggest the desirability of an expansive reading of Cohen, even if controlling decisions left us freer in that respect than we think. While the grievance created by an improper attachment pendente lite is 'important,' 337 U.S. at 546, 69 S.Ct.1221, it is not important enough to make the decision 'final'."

425 F.2d at 921

This statement is even more appropriate today in view of the ever increasing burden on the courts of appeals.

This principle was recently reiterated by the Court of Appeals for the Seventh Circuit in Rosentfeldt v. Comprehensive Accounting Service Corp., 514 F.2d 607 (1975) where the court said:

"Moreover, we do not believe an order granting a writ of attachment constitutes a final 'collateral' order within the meaning of Cohen. In Swift, [Swift & Co. Packers v. Compania Colombiana del Caribe, S.A., 339 US 339 US 684 (1950)] decided during the term following Cohen, the Supreme Court held that an interlocutory order vacating an attachment was final and appealable under §1291.

'Appellate review of the order dissolving the attachment at a later date would be an empty rite after the vessel had been released and the restoration of the attachment only theoretically possible.'

339 U.S. at 689, 70 S.Ct. at 865

Justice Frankfurter, speaking for the unanimous Court, went on to note, however, that far different considerations are involved when the order is one granting an attachment.

'The situation is quite different where an attachment is upheld pending determination of the principal claim. Such was Cushing v. Laird, 107 U.S. 69, 2 S.Ct.196, 27 L.Ed.391, which is urged on us. In such a situation the rights of all the parties can be adequately protected while the litigation on the main claim proceeds.'

Id.

The courts of appeals have recognized this distinction; when a district court has entered an order granting a writ of attachment, replevin, or sequestration, or refusing to vacate one, the order has not been deemed final under §1291. United States v. Estate of Pearce, 498 F.2d 847, 849-850 (3rd Cir.1974); Financial Services, Inc. v. Ferrandina, 474 F.2d 743, 745 (2d Cir. 1973); West v. Zurhorst, 425 F.2d 919, 920-921 (2d Cir.1970); Flegenheimer v. General Mills, Inc., 191 F.2d 237, 239-240 (2d Cir. 1951). When, however, a petition for a writ has been denied, or a previously entered order issuing such a writ has been vacated, appellate jurisdiction under §1291 has been found to exist."

514 F.2d at 610-611

Nor can Charterers bring their appeal under 28 U.S. Code §1292 which provides that the courts of appeals shall have jurisdiction of appeals from certain interlocutory orders or decrees. Thus in Financial Services Inc. v. Ferrandina, 474 F.2d 743 (2d Cir. 1973), a case in which the defendant, after losing a motion to vacate an attachment, started a separate action against the U.S. Marshal seeking an order requiring him to return to the defendant all sums already collected under the attachment and enjoining the Marshal from serving any further writs in the first action, this Court stated:

"While the relief denied was injunctive in form, Judge Tenney believed, and CT/East argues to us, that the injunction sought in the second action was no more than a motion to vacate the attach-

ment in the first action by another name. On these facts, there is little doubt that this is so. The second action seeks to prevent any further use of the order of attachment obtained in the first. Moreover, the relief sought includes repayment of any sums already collected under that order.

We have held that denials of motions to vacate attachments are not appealable under the collateral order gloss, see Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), on the 'final decision' requirement of 28 U.S.C. §1291. West v. Zurhorst, 425 F.2d 919 (2d Cir.1970); see Fleggenheimer v. General Mills, Inc., 191 F.2d 237 (2d Cir. 1951). Were we to permit this appeal under section 1292(a)(1) on these facts, we would sanction wholesale circumvention of the salutary rule of nonappealability reaffirmed in West.

474 F.2d at 743

In a similar case, American Mortgage Corp. v. First National Mortgage Co., 345 F.2d 527 (7th Cir.1965) the court dismissed an appeal from an order denying a motion to vacate an attachment saying:

"Defendants argue that an attachment should be treated as a temporary injunction, and that an appeal is proper in this instance by analogy to the temporary injunction situation *** Both arguments are completely specious. The distinction between attachments and injunctions has been so long recognized that we are convinced that Congress would have provided for interlocutory appeals in cases such as this had it deemed such appeals desirable.***"

345 F.2d at 528

Since the present action is based upon admiralty jurisdiction, (see App. 1a,18a) there is a separate and independent ground for rejection of Charterers' argument that this Court has jurisdiction under 28 U.S.C. § 1292(a)(1). As this Court recently noted in Tradax Limited et al v. M.V. HOLENDRECHT et al, ___ F.2d ___ (Docket No. 76-7346, 2d Cir. March 15, 1977) admiralty courts do not have general equitable jurisdiction, Schoenamsgruber v. Hamburg American Line, 294 U.S. 454 (1935), and

"when an admiralty court issues or denies [a stay of an action pending arbitration], the Schoenamsgruber Court held, its order cannot be an injunction because it has no equitable jurisdiction. Its order is simply a postponement of the trial--a 'mere calendar order', see Moran Towing & Transp. Co. v. United States, 230 F.2d 660, 662, 663 (2d Cir. 1961)".

Consequently, whether Charterers characterize Judge Goettel's order as an order denying a motion to vacate an attachment or to restrain Owner from further attempting to exercise liens is of no moment. Both characterizations lead to the inescapable conclusion that the order is unappealable.

Nor are Charterers helped by 28 U.S. Code §1292(a)(3), providing that the courts of appeals have jurisdiction of appeals from

"(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities

of the parties to admiralty cases in which appeals from final decrees are allowed."

In Pannizzo v. Lauro, 228 F.2d 222 (2d Cir. 1955) this Court, in a per curiam decision, held that denial of a motion to vacate an attachment was not appealable under this section because such a denial "settled no rights or liabilities of the parties." See 9 Moore's Federal Practice § 110.19[3] at pages 209,210.

Charterers argue that, in view of the Charter provision for London arbitration, Judge Goettel's order effectively terminated the action in New York and, for that reason, an appeal should be available. However Judge Goettel specifically gave Charterers leave to renew their motion on the basis of evidence showing that the parties, by entering into the Agreement of July 2, 1976, thereby implicitly agreed not to take any action outside the arbitration proceedings. The order stated:

Consequently, the motion is denied subject to renewal upon affidavits setting forth the unquestioned contractual intent of the parties in the Memorandum of Agreement dated July 2, 1976, or, if that is not possible, the availability of witnesses to testify as to the contractual intent.

(App. 27a-28a)

Charterers have not yet sought to bring any such evidence to the attention of the District Court but clearly remain

free to do so. Thus it cannot be said that the order terminates the action in New York.

A somewhat similar contention was made in Moran Towing & Transp. Co. v. United States, 290 F.2d 660 (2d Cir. 1961).

In that case the District Court had granted a stay pending the determination of certain questions of fact pursuant to a Disputes Clause in a government contract. This Court held the stay order not appealable, stating:

"The effect of the order is merely to hold the proceeding in admiralty in abeyance until the contractual remedy has been exhausted and the factual disputes between the parties decided by the Contracting Officer, subject to revision on appeal to the Secretary. While appellants claim 'the practical effect of the stay order is to terminate * * * this litigation on the merits,' we disagree. After a decision has been made under the Disputes Clause, the matter will then be ripe for such adjudication by the District Court as the terms of such decision and the contentions of the parties at that time make proper. Moreover, if the facts should be decided against appellants by the Contracting Officer and the libel should be dismissed, appellants may then on appeal from the final decree bring up for review the legality and propriety of the rulings already made by Judge Cashin, including his rulings relative to the construction of the Disputes Clause, and the alleged waiver of the terms of the Disputes Clause by appellee's payment of the final balance due under the contract."

290 F.2d 662

See Seaboard & Caribbean Transport Corp. v. Hafen-Dampfschiffahrt A. G. Hapag-Hadac Seebader-Dienst, 329 F.2d 538,540 (5th Cir. 1964), where the court retained jurisdiction to enter a decree upon an award of London arbitrators and to require further security if the need therefor were shown. Similarly, in the present case, it remains for the District Court to review and confirm the London arbitrators' award pursuant to Chapter 2 of the United States Arbitration Act, 9 U.S. Code § 201 et seq.

Further, while Charterers base their arguments upon the premise that the London arbitration will proceed to a prompt conclusion, rendering any substantial action in the District Court unnecessary, there may well be a requirement for the District Court to take action to compel Charterers to continue with the arbitration, particularly if (as Owner believes) Charterers are experiencing financial difficulties. (see App. 106a-107a, 147a)

For all of these reasons we respectfully submit that this Court does not have appellate jurisdiction concerning Judge Goettel's order dated February 15, 1977.

POINT II

OWNER IS ENTITLED TO OBTAIN SECURITY
IN AID OF LONDON ARBITRATION BY VIRTUE
OF ITS CONTRACT LIEN AND THE TRADITIONAL
PROCESS OF MARITIME ATTACHMENT AND
GARNISHMENT

Owner commenced its action in admiralty in rem against the freights, sub-freights, charter hire and/or sub-charter hire of the Vessel and in personam against Charterers. (App. 1a-5a) A warrant for arrest against the freights, sub-freights, charter hire and/or sub-charter hire was issued pursuant to Rule C(3) of the Supplemental Rules for Certain Admiralty and Maritime Claims, ("Supplemental Rules") F.R.C.P. (App. 13a) and served on Garnishee. (App. v) Also process of maritime attachment and garnishment was issued pursuant to Rule B(1) of the Supplemental Rules (App. 8a-11a) and served on Garnishee and three New York banks. (App. v, vi) No question has been raised concerning Charterers' not being present within the District (see App. 7a) or concerning the presence within the District of sub-charter hire, belonging to Charterers, in the amount of \$121,701.57. This fund was both arrested and attached in the hands of Garnishee, which has advised that it is holding the fund subject to the order of the District Court.

As a result of Owners' having proceeded both in rem against the sub-charter hire and in personam against Charterers

with maritime attachment of the sub-charter hire, Charterers were obliged to persuade the District Court below both that Owner did not have a maritime lien on the sub-charter hire of the Vessel and that Owner was not entitled to maritime attachment of the sub-charter hire. Charterers failed to persuade the court on either point.

(a) Owner was entitled to proceed in rem to enforce its maritime lien

Rule C(1)(a) of the Supplemental Rules, F.R.C.P. provides that an action in rem may be brought "to enforce any maritime lien". Owner's right to a maritime lien was spelled out in Clause 18 of the Charter. (App. 45a) It has long been recognized that, to secure the payment of sums due under a charter of his vessel, a ship owner may create, by express provision in the charter party, a lien on the sub-freights earned by his vessel. Marine Traders, Inc. v. Seasons Navigation Corp., 422 F.2d 804, 806 (2d Cir. 1970) As Judge Goettel correctly found:

"Clause 18 of the Charter provides plaintiff with 'a lien upon all cargoes, and all sub-freights for any amounts due under this Charter ***' Such language has been held to include claims for damage and to extend to all monies due a charterer under a sub-charter. Freights of the Kate, 63 F.707 (SDNY 1894)."

(App. 25a)

In the present case Owner and Charterers agreed in the Memorandum dated July 2, 1976 that, with respect to the repairs of stevedores' damage to the Vessel, the Vessel would be considered "on-hire" and that Charterers were to pay to Owner "the whole of the direct cost attributable to repairs of the stevedores' damage under Clause 3(b) [of the Memorandum] and hire for any time chareable [sic] to Charterers ***". (App. 71a) Further, such payments were to be made in accordance with Clause 5 of the Charter, which specified that "Payments of said hire to be made in London in cash in United States Currency [to a specified bank and account] monthly in advance". (App. 72a, 42a) The specific amounts spent for repairs and the specific periods for which hire was to be paid were detailed by Owner in various statements and invoices transmitted to and received by Charterers. (see App. 81a - 92a, 135a - 146a) However, despite the agreements contained in the Memorandum, Charterers have not made any payments of hire and repair costs totaling \$798,686.75. (App. 3a - 4a)

Charterers argue in this Court that the District Court was in error in recognizing Owner's lien on sub-charter hire of the Vessel because the hire due during the repair of the stevedores' damage and the cost of such repairs were due as a result of the Memorandum of July 2, 1976 rather than the Charter and that the Memorandum

does not purport to give a lien. (Appellants' Brief, p. 16) This argument ignores the fact that the Memorandum was made with respect to "'DRYS' Charterparty dated 22.8.72", (App. 70a) explicitly stated that the "provisions of Clause 5 of the Charterparty shall apply to the payments required under this Clause," (App. 72a) and concluded with the statement that:

"The terms of this Agreement shall for purposes of the Arbitration Clause in the Charterparty be deemed to be a part of the Charter."

(App.73a; emphasis added)

While that clearly was sufficient evidence as to the intent of the parties to make the Memorandum part of their Charter, Judge Goettel expressly gave Charterers leave to renew their motion on the basis of evidence "setting forth the unquestioned contractual intent of the parties in the 'Memorandum of Agreement'." (App.27a) Charterers have not taken advantage of this opportunity.

Further, Charterers appear to argue that no lien on sub-charter hire exists because Charterers are disputing liability for the stevedores' damage in London arbitration and Owner's claims for hire and repair costs are "unliquidated". (Appellants' Brief p.17) However, it is clear that the agreements contained in the Memorandum were made to facilitate the completion of what were obviously going

to be very substantial and lengthy repairs, quite unlike the normal annual drydocking referred to in Clause 21 of the Charter. (App.43a) For this reason, it was agreed that, if the repairs of the stevedores' damage took longer than other repairs and maintenance work for Owner's account, the Vessel would be deemed "on hire", Charterers would pay the hire and the repair costs and Owner would be able to get the Vessel repaired expeditiously so that it could resume performance of the Charter. (App. 70a - 73a, 105a - 106a, 138a - 143a)

It was clearly understood that Charterers' agreement to pay hire during the repair period and the repair costs was "without prejudice to the Charterers' rights to dispute *** such account or any on-hire period" and that any such dispute would be submitted to arbitration. (App. 72a - 73a) However, this contemplated that Charterers would pay first and dispute later, rather than what actually happened.

While Charterers' argument concerning the "unliquidated" hire and repair costs is contradicted by the Memorandum, which shows that these were "known amounts clearly chargeable to Charterers' account" (see Appellants' Brief, p.17) it also is undercut by the very British treatise cited by Charterers for the proposition that the lien applies only to such "known amounts". 2 Carver's Carriage by Sea (12th ed. 1971) §1346 p.1142, in dealing

with a lien for "deadfreight" (which may also be due under a charter party), states expressly, on the authority of the House of Lords, that such a lien covers "unliquidated damages for failing to load a full and complete cargo". This is entirely consistent with the much quoted statement in Freights of the Kate, 63 F.707 (SDNY 1894) cited by Judge Goettel (App.25a) that:

"*** This clause is a common one in time charters. The words 'due' and 'under the charter' are words limiting the extent of the lien given. They are used in their ordinary commercial sense, and mean sums which are 'due' and payable at the time when any freights are due and collectible, and which might be then lawfully collected and applied to the sums then 'due' in case of the charterers' default, as distinguished from future or contingent liabilities, not then payable; and also such sums as become due under the provisions of the charter.

This lien will, therefore, include charter hire up to the time when the vessels were withdrawn from the company's service, and such other amounts also as were then actually 'due' to the shipowners from the charterers, for advances made for charterers' account, for coal, provisions, port dues, and any other sums which the provisions of the charter required the company to pay; also any sums then due and payable on account of short delivery or damage of cargo, through the fault of the steamship company, for which the company, by the terms of the charter, was bound to indemnify the ship and owners. One of these damage claims, against the

Advance, amounting to \$900, has been already paid by the shipowners, and other suits on similar claims are pending. All these obligations became fixed and payable at the close of the voyage, when the subfreights pledged were due and collectible; and they were 'due' under the provisions of the charter."

(63 F. at 722-723;
emphasis added)

Accordingly, we respectfully submit that the District Court did not err in stating that Owner had a valid lien. (App. 25a - 26a)

(b) Owner was entitled to maritime attachment of sub-charter hire of the Vessel

Rule B(1) of the Supplemental Rules, F.R.C.P. provides that, with respect to any admiralty or maritime claim in personam, a verified complaint may contain a prayer for process to attach the defendant's goods and chattels, or credits and effects in the hands of named garnishees to the amount sued for "if the defendant shall not be found within the district". Owner's action below conformed to these requirements (App. 1a - 7a) and Charterers have not disputed that they were not within the District or that the sub-charter hire was subject to the maritime attachment and garnishment. Rather, Charterers have argued that Owner is prohibited from making any attachment because of the mere existence of pending arbitration proceedings in London.

Judge Goettel, in the District Court below, considered and rejected each of Charterers' arguments. Recognizing that The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972) "supports the enforcement of forum selection clauses in international commerce", (App.21a) he concluded that, notwithstanding this decision, "the plaintiff's attachment can be sustained if his arguments as to a right to security under either the Supplemental Rules or Title 9 are valid". (App.21a) He found the question to be "a close one" but resolved it by denying Charterers' motion. We respectfully submit that he did not err in doing so.

- (1) The London arbitration clause in the Charter does not deprive Owner of its right to security according to the usual course of admiralty proceedings

It should be noted at the start that Charterers do not appear to oppose the in rem arrest of sub-charter hire on the ground that Owner is precluded from such action by the London arbitration but rather limit themselves to contending that Owner does not have a maritime lien on which to base such an arrest. Since the lien clause (Clause 18) follows immediately after the arbitration clause (Clause 17) in the Charter, it is indeed difficult for Charterers to argue that Owner is not entitled to exercise its lien because of a pending arbitration. Such an argument would

necessarily require assigning a precedence to arbitration which is justified neither by the language of the clause providing for arbitration or the practicalities of the charter situation in which a dispute, subject to arbitration, may arise.

It should also be noted that the lien clause (see App.15a) provides the benefit of a lien to both vessel owner and charterer. Thus, either party may be in the position of asserting its lien at the same time as it asserts its right to arbitration. The lien clause therefore provides a contract right to security which is mutual in its application and is in no respect inconsistent with the right to arbitration. While the arbitrators can determine the dispute between the parties, they cannot execute a maritime lien; that is solely within the power of the admiralty court which has jurisdiction over the res. The Maggie Hammond, 76 U.S. 435 (1869)

Charterers do assert, however, that Owner is not entitled to maritime attachment in view of the pending London arbitration. We respectfully submit that any distinction between arrest in rem and maritime attachment in this respect is untenable. Maritime attachment, like arrest in rem, is admiralty process governed by the Supplemental Rules, F.R.C.P. The result of maritime attachment is exactly the same as arrest in rem where arbitration is involved, namely, in the context of the

present case, that the fund of \$121,701.57 attached in the hands of Garnishee, is held as security for the eventual satisfaction of the arbitration award.

Further, in the U.S. Arbitration Act, 9 U.S. Code §1 et seq. (the "Act") Congress specifically recognized that in the context of maritime contracts the obtaining of security was not inconsistent with an agreement to arbitrate. Section 8 of the Act provided:

"If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award."

9 U.S. Code §8

See Marine Transit Corp. v. Dreyfus, 284 U.S. 263, 275 (1932); Diana Compania Maritima S.A. v. Subfreights of SS Admiralty Flyer, 280 F.Supp. 607 (SDNY 1968).

As the Supreme Court concluded in The Anaconda v. American Sugar Refining Co., 322 U.S. 42, 46 (1944), a case in which the parties had agreed in the arbitration clause that the provisions of Section 8 should not apply:

"Section 8 says the aggrieved party, 'notwithstanding' the right granted by §4, may begin a suit in admiralty by libel and seizure. Our question is whether the Act contemplates or permits consensual elimination of the procedure thus saved by the Act and contractual confinement of the aggrieved party's resort to a court to a petition for an order to arbitrate under §4. We think the answer must be in the negative. Congress may have thought it wise not to raise doubts under the admiralty clause of the Constitution. It may have thought that in many causes in admiralty if the aggrieved party could not seize the ship of his opponent, an arbitral award would be wholly unenforceable as the vessel might seldom or never again be within the jurisdiction of our courts. But, whatever its reasons, Congress plainly and emphatically declared that although the parties had agreed to arbitrate, the traditional admiralty procedure with its concomitant security should be available to the aggrieved party without in any way lessening his obligation to arbitrate his grievance rather than litigate the merits in court.

It is enough that Congress has so declared. We think a party can not stipulate away such a jurisdiction which the legislation declares open as heretofore."

(emphasis added)

As this Court has held, Section 8 is available even where the arbitration is to be held abroad. Konstantinidis v. Denizcilik Bankasi T.A.O., 307 F.2d 584 (2d Cir.1962) (arbitration in Turkey).

Charterers contend that Owner is not an "aggrieved" party within the meaning of Section 8 because the London arbitration was commenced previous to the action in New York. This contention has previously been rejected by the

District Court below. As Judge Metzner stated in Texas San Juan Oil Corp. v. An-Son Offshore Drilling Co., 194 F.Supp. 396, 398 (SDNY 1961):

"Respondent contends that 'aggrieved' as used in this section of the Act must be defined in the same way as 'aggrieved' is expressly defined in Section 4 of the Act (i.e., aggrieved by the failure, neglect, or refusal of another to arbitrate). Since the libel contains no allegation that libelant has demanded arbitration or that respondent has failed or refused to arbitrate, respondent questions its right to qualify under this section.

The purpose of Section 8 is to make available to a party, who had agreed to arbitrate in a maritime controversy, 'the traditional admiralty procedure with its concomitant security' and at the same time to save his right to arbitration. The Anaconda v. American Sugar Co., 1944, 322 U.S. 42, 46, 64 S.Ct. 863, 866, 88 L.Ed. 1117. See also The Belize, D.C.S.D.N.Y. 1938, 25 F.Supp. 663, 665; Murray Oil Products Co. v. Mitsui & Co., 2 Cir. 1944, 146 F.2d 381, 384.

In essence, 'to achieve this end the arbitration is made a phase of the suit in admiralty.' The Sydfold, D.C.S.D.N.Y. 1938, 25 F.Supp. 662, 663. In light of this purpose the construction argued by the respondent would seem erroneous. It would force a party to choose between arbitration, on the one hand, and his ancient admiralty right of jurisdiction in rem or by foreign attachment, on the other (except for the singular instance where the opposing party failed, neglected or refused to go to arbitration). The courts have rejected this conclusion."

(emphasis added)

See also Greenwich Marine, Inc. v. SS Alexandra, 339 F. 2d 901, 904 (2d Cir. 1965); In Reefer Express Lines Pty. v. Petmovar, S.A., 420 F.Supp. 16 (SDNY 1976) the District Court below held it was immaterial that arbitration had been initiated and hearings on the merits of the dispute had been held prior to commencement of the action for security. This also seems to have been the holding in Instituto Cubano de Estabilizacion del Azucar v. The Firebranch, 130 F.Supp. 170 (SDNY 1954).

- (2) Recent decisions of the Supreme Court do not require vacation of Owner's arrest and maritime attachment

Charterers contend that the decisions of the Supreme Court in The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972) and in Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) require vacation of Owner's arrest and maritime attachment. There is no merit in this contention.

In The Bremen, supra, a towage contract provided that "any dispute arising [thereunder] must be treated before the London Court of Justice". This forum selection clause was enforced by the Supreme Court. The case did not involve any question of security (the parties having agreed to make security available in London as well as Florida - see 407 U.S. 1, 4). It did give rise, however, to Sanko SS Co. v. Newfoundland Refining Co., 411 F.Supp. 285 (SDNY 1976), aff'd without opinion 538 F.2d 313 (2d

Cir. 1976), cert. denied U.S. (1976), a case on which Charterers strongly rely.

In Sanko an attachment of the defendant's funds was made pursuant to New York state law. (C.P.L.R. §6201) The charter party there involved contained a judicial forum selection clause as follows:

"40.(a) This charter shall be construed and the relations between the parties determined in accordance with the law of England.

(b) Any dispute arising under this charter shall be decided by The English Courts to whose jurisdiction the parties agree whatever their domicile may be;

Provided that either party may elect to have the dispute referred to the arbitration of a single arbitrator in London in accordance with the provisions of the Arbitration Act, 1950, or any statutory modification or re-enactment thereof for the time being in force."

The District Court held the clause was valid, on the authority of The Bremen, agreeing with defendant's assertion that the clause precluded plaintiff from invoking the jurisdiction of the court and required that the action, and the attachment, be dismissed.

The Sanko case is clearly distinguishable from the present case on several grounds. The judicial forum selection clause there involved was clearly a very different and more far reaching agreement than Clause 17 of the Vessel's Charter which merely provided for arbitra-

tion in London before three commercial men. Further, the court in Sanko was dealing, not with traditional maritime arrest or attachment pursuant to the Supplemental Rules, F.R.C.P., but rather with the special rules of attachment under New York state law. The court recognized the limits of this procedure, stating:

" *** So far as we know, there is no provision of New York law which would authorize holding an attachment 'in limbo' pending the outcome of litigation going forward in some other jurisdiction."

411 F.Supp. 285, 286, f.n.5

The rules for obtaining an attachment under the CPLR are quite strict and quite different from attachment under the Supplemental Rules. Once the plaintiff has shown that he has a cause of action, he must then show that his cause of action has substantial merit. In AMF Inc. v. Algo Distributors, Ltd., 48 App. Div. 2d 352, 369 N.Y.S. 2d 460 (2d Dep't 1975) the court stated:

"Of greater significance is the fact that under subdivision (a) of CPLR 6212 a creditor must show, by affidavit and other written evidence, the existence of a cause of action as well as the ground specified in CPLR 6201 authorizing the attachment. As noted, if the attachment papers fail to establish a prima facie cause of action, or if they establish that the creditor will ultimately be defeated, the order of attachment must be vacated."

48 App. Div. 2d 352, 360-361
369 N.Y.S. 2d 460, 467-468

As the District Court noted in Sanko, there is no precedent under the CPLR for an attachment to be held "in limbo" pending the outcome of a foreign arbitration. However, as stated by this Court in Maryland Tuna Corp. v. The M.S. Benares, 429 F.2d 307 (2d Cir. 1970):

"We are at a loss to explain the extended discussion in Judge Levet's opinion of the failure of Maryland Tuna to comply with the requirements of the New York State attachment laws. State law is irrelevant to the validity of process under Supplemental Rule B(1). See 2 E. Benedict, Admiralty, §288 at p.348 (6th ed. A. Knauth 1940). The purpose of the Supplemental Rule was to preserve the ancient process of maritime attachment that had been known to courts of admiralty for centuries. See F. Clerke, Praxis Supremae Curiae Admiralitatis titles 28, 32, translated in J. Hall, Practice and Jurisdiction of the Court of Admiralty 60-67, 70-71 (1809). The remedy, under the terms of Rule B(1), is completely independent of state law and of any state attachment or garnishment procedures, which may be employed by a libellant either instead of, or in addition to the process issued under the Rule."

(429 F.2d 307, 321;
emphasis added)

By contrast, in the federal courts, an action may be stayed and thus "held in limbo" pending the result of a foreign arbitration. Numerous cases have so held. In Danielsen v. Entre Rios Rys. Co., 22 F.2d 326 (D.C.Md.) 1927) the court ordered a stay of the action pending the result of an arbitration to take place in London.

The court said:

"Such a stay is to be clearly distinguished from prohibition against assumption of jurisdiction in the first instance."

Similar results were reached in Uniao De Transportadores v. Companhia De Navegacao, 84 F.Supp. 582 (EDNY 1949) where the court stayed a trial pending the result of an arbitration to be held in Portugal; Fox v. The Guiseppe Mazzini, 110 F.Supp. 212 (EDNY 1953) where the court stayed an action pending the results of an arbitration in London; and Mannesmann Rohrleitungsbau v. S.S. Bernhard Howaldt, 254 F. Supp. 278 (SDNY 1965) where the court stayed an action pending the results of an arbitration to take place in The Netherlands. See also Konstantinidis v. Denizcilik Bankasi T.A.O., supra. Consequently, unlike the situation under New York state law, there is ample authority under federal law to provide for an action to remain "in limbo" pending the result of a foreign arbitration.

In Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974), the other Supreme Court case relied on by Charterers, the issue was whether the parties were free to arbitrate a dispute involving the federal securities laws, an issue which stemmed from the prior decision in Wilko v. Swan, 346 U.S. 427 (1953). The case did not

involve attachment or any question of security. Certainly the general language cited by Charterers (Appellant's Brief pp.11-13) does not support their argument that, by agreeing to arbitration, the parties also necessarily agree to give up all other rights which they may have for security for their claims, whether under their contract or by law.

- (3) The Convention on the Recognition and Enforcement of Foreign Arbitral Awards does not prohibit the obtaining of security pursuant to the usual course of admiralty proceedings

Charterers contend that the enactment of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention") in Chapter 2 of the U.S. Arbitration Act, 9 U.S. Code §201 et seq, destroyed the clear, strong and long standing right of parties to use traditional maritime attachment and garnishment and in rem arrest in aid of arbitration. Certainly, nothing in Chapter 2 warrants such a sweeping conclusion. In fact, the legislative history of Chapter 2 of the Act clearly demonstrates that the settled case law, referred to above at pages 26-30 of this Brief permitting parties to use maritime attachment and garnishment and in rem arrest in aid of arbitration, remains unchanged despite enactment of Chapter 2.

"*** The consensus of the group, with which the Department of Justice concurs, was that rather than amending a series of

sections of the Federal Arbitration Act it would be preferable to enact a new chapter dealing exclusively with recognition and enforcement of awards falling under the Convention. This approach would leave unchanged the largely settled interpretation of the Federal Arbitration Act. *** "

1970 U.S. Code Cong. and Adm.
News, 3601, 3603, 91st Cong.,
2d Sess.

Charterers rely on the case of McCreary Tire & Rubber Co. v. CEAT S.p.A., 501 F.2d 1032 (3d Cir. 1974) to support their proposition that the Convention alters the availability of maritime attachment and arrest in rem. However, that case is restricted to availability of state court attachment remedies. The court in McCreary, supra, stated:

"The obvious purpose of the enactment of Pub. L. 91-368, permitting removal of all cases falling within the terms of the treaty, was to prevent the vagaries of state law from impeding its full implementation. Permitting a continued resort to foreign attachment [Pennsylvania state court attachment] in breach of the agreement is inconsistent with that purpose. *** "

(501 F.2d 1038; emphasis added)

While the removal provisions of 9 U.S.C. §205 may indicate a desire to avoid the vagaries of state law, nothing in the Convention alters the traditional right of parties to a maritime contract to seek process of maritime attachment and arrest in rem to which they would

be entitled "if the basis of jurisdiction be a cause of action otherwise justiciable in admiralty". 9 U.S. Code §8 Certainly, there is no basis for eliminating this traditional right in view of the absence of language in the Convention on the point, the stated intention of the drafters that the "largely settled interpretation of the Federal Arbitration Act" should be left unchanged, and the strong pronouncement of the Supreme Court in The Anaconda, supra, that the right was so important that it could not be waived by the parties.

FINAL POINT

For all of the reasons discussed above, we respectfully submit that this Court should dismiss Charterers' appeal for lack of appellate jurisdiction or, in the alternative, if it concludes that Judge Goettel's order of February 15, 1977 is appealable, should affirm the order denying vacation of Owner's arrest in rem and maritime attachment and garnishment of sub-charter hire of the Vessel.

Dated: New York, New York
March 21, 1977

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that ²~~2~~ copy³ of the annexed *appellee's brief*
was this day served on the following:

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